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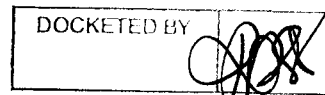
ADMITTED TO PRACTICE IN:  
ARIZONA, COLORADO, MONTANA,  
NEVADA, TEXAS, WYOMING,  
DISTRICT OF COLUMBIA

January 11, 2008

Arizona Corporation Commission  
**DOCKETED**

JAN 11 2008

Docket Control  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007



Re: In The Matter Of The Consideration, Pursuant To  
A.R.S. § 40-252, To Modify Decision No. 67744 Relating  
To The Self-Build Option.

Docket No. E-01345A-07-0420

To Whom It May Concern:

Enclosed for filing in the above-referenced docket are fourteen (14) copies of Prepared Direct Testimony Of Theodore Roberts, ("Testimony") on behalf of Mesquite Power, L.L.C., Southwestern Power Group II, L.L.C. and Bowie Power Station, L.L.C. ("Mesquite/SWPG/Bowie").

Also enclosed are two (2) additional copies of the Testimony. I would appreciate it if you would "filed" stamp the same and return them to me in the enclosed stamped and addressed envelope.

Thank you for your assistance with regard to this matter.

Sincerely,

Angela R. Trujillo

Secretary

Lawrence V. Robertson, Jr.

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JAN 11 2008

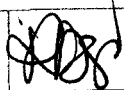
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PREPARED DIRECT TESTIMONY

OF

THEODORE E. ROBERTS

DOCKET NO. E-01345A-07-0420

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Q.1 Please state your name and business affiliation.

A.1 My name is Theodore E. Roberts. I am employed by Semptra Energy as Senior Regulatory Counsel. In that regard, Appendix "A" to this testimony sets forth a summary of my education and professional experience.

Q.2 Upon whose behalf are you testifying in this proceeding?

A.2 I am providing testimony on behalf of Mesquite Power, L.L.C., Southwestern Power Group II, L.L.C. and Bowie Power Station, L.L.C. ("Mesquite/SWPG/Bowie").

Q.3 What is the general nature of the direct testimony that you are providing on behalf of Mesquite/SWPG/Bowie in this proceeding?

A.3 Mesquite/SWPG/Bowie are responding to the Commission's invitation to offer comment as to whether and how the self-build moratorium approved by the Commission in Decision No. 67744 should be modified.

Q.4 What is the background to the "invitation" from the Commission to which you refer?

A.4 In Decision No. 69663, issued on June 28, 2007 in APS' 2005 rate case, the Commission ordered that it's Hearing Division

"...conduct a proceeding pursuant to A.R.S. § 40-252 to consider modifying Decision No. 67744 relating to the self-build option." [Decision No. 69663, page 157, lines 13-14]

In Decision No. 67744, issued on April 7, 2005 in APS' 2003 rate case, the Commission had approved, with certain modification, the self-build moratorium that was the subject of an August 18, 2004 Settlement Agreement executed by parties to APS' 2003 rate case.

Thereafter, on July 10, 2007, the above docketed proceeding was established for the aforesaid purpose. On July 23, 2007, Mesquite/SWPG/Bowie filed a joint Application For Leave To Intervene in this proceeding. By means of a September 12, 2007 Procedural Order the requests of Mesquite/SWPG/Bowie and several other parties for leave to intervene were granted.

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1 On October 4, 2007, another Procedural Order was issued in this proceeding. Among  
2 other procedural matters, the Procedural Order provided that parties desiring to file direct  
3 testimony on the question of whether or not Decision No. 67744 and the self-build  
4 moratorium should be modified were to do so on or before 12:00 p.m. on Friday, January  
5 11, 2008. My direct testimony on behalf of Mesquite/SWPG/Bowie is being submitted in  
6 response to that directive.

7  
8  
9  
10 **Q.5 Do Mesquite/SWPG/Bowie believe that Decision No. 67744 and the self-build  
11 moratorium should be modified?**

12  
13 A.5 Yes, they do. In my direct testimony I will discuss both why and how they believe the  
14 self-build moratorium should be modified.

15  
16  
17 **Q.6 Why do Mesquite/SWPG/Bowie believe that a modification is necessary?**

18  
19 A.6 In Decision No. 67744, the Commission reiterated its previously expressed support for  
20 competitive wholesale electricity markets, and it found the self-build moratorium to be  
21 consistent with that public policy objective. [Decision No. 67744, page 26, lines 8-9] In  
22 addition, the Commission stated that

23  
24 "...we will require APS to obtain the Commission's  
25 expressed approval for APS' acquisition of any  
26 generating facility or interest in a generating facility  
27 pursuant to a RFP or other competitive  
28 solicitation<sup>35</sup> issued before January 1, 2015"  
[Decision No. 67744, page 25, lines 23-25]  
[emphasis supplied];

and, in Footnote 35, the Commission defined the phrase "competitive solicitation" to  
include"

"...a RFP issued pursuant to paragraph 78 of the  
Settlement Agreement or any solicitation issued by  
APS using its Secondary Procurement Protocol  
pursuant to paragraph 80 of the Settlement  
Agreement." [Decision No. 67744, page 25, lines  
27-28]

In Docket No. E-01345A-06-0464, the Commission had occasion to interpret and apply  
the provisions of the self-build moratorium and the applicable portions of Decision No.  
67744 for the first time. As the Commission is aware, there were sharp disagreements  
among representatives of APS, the Commission's Staff, the Arizona Competitive Power  
Alliance and Mesquite/SWPG/Bowie as to how various provisions of the Settlement  
Agreement and related portions of Decision No. 67744 were to be interpreted and applied.

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1 I will not reiterate those disagreements. However, it became clear that certain provisions  
2 of the Settlement Agreement were subject to more than one interpretation, and that certain  
3 events, such as the exit of APS' affiliate, Pinnacle West Energy Corporation ("PWEC"),  
4 from the competitive generation business had superseded the factual and legal setting in  
5 which the Settlement was negotiated and adopted. In addition, Mesquite/SWPG/Bowie  
6 believe that the Commission's ultimate disposition of that matter in Decision No. 69400  
7 was, in reality, substantially influenced by external circumstances surrounding the  
8 proceeding, including the time constraint within which the Commission had to render a  
9 decision.

10 What Mesquite/SWPG/Bowie believe would be constructive in this proceeding is to  
11 address how the self-build moratorium and Decision No. 67744 should be modified in  
12 light of (i) the Commission's experience in Docket No. E-01345A-06-0464, and (ii)  
13 subsequent developments at the Commission relating to the competitive procurement of  
14 power and power resources by Arizona's electric utilities, especially Decision No. 70032  
15 and the Commission's adoption of the Recommended Best Practices For Utility  
16 Procurement.

17 **Q.7 Please describe how Mesquite/SWPG/Bowie believe that the self-build moratorium**  
18 **and related portions of Decision No. 67744 should be modified.**

19 **A.7** Mesquite/SWPG/Bowie believe that (i) Decision No. 70032, as issued by the Commission  
20 on December 4, 2007 in Docket No. E-00000E-05-0431, and (ii) the Commission Staff's  
21 November 6, 2007 Recommended Best Practices For Procurement, as adopted in  
22 Decision No. 70032, should govern the Commission's re-examination of Article IX  
23 (Competitive Procurement of Power) of the Settlement Agreement and related portions of  
24 Decision No. 67744. As the Commission noted in Decision No. 70032,

25 "Commission Decision No. 67744 directed Staff to  
26 schedule workshops on resource planning issues.  
27 Additionally, as part of the Settlement Agreement  
28 of that case, it was agreed that the Commission  
Staff will schedule workshops on resource planning  
issues to focus on developing needed infrastructure  
and developing a flexible, timely, and fair  
competitive procurement process. (Paragraph 79,  
Settlement Agreement)."

29 The aforementioned Recommended Best Practices For Procurement represent the work  
30 product resulting from those workshops, and they establish specific standards and  
31 requirements for the intended competitive procurement process and infrastructure. Thus,  
32 the Recommended Best Practices For Procurement should be integrated into the  
33 Settlement Agreement and Decision No. 67744 in order to (i) provide greater clarity and  
34 unity, (ii) preserve the benefits of wholesale competition that the Commission found  
35 existed in its prior decisions, and (iii) fill in gaps that were exposed during the  
36 Commission's consideration of Docket No. E-01345A-06-0464.

1 More specifically, the Recommended Best Practices For Procurement should clarify the  
2 standard that APS must meet when seeking approval of any self-build, as well as the  
3 standard(s) by which the Commission will evaluate any self-build proposal put forth by  
4 APS. Accordingly, the Recommended Best Practices For Procurement should be  
5 followed by APS in seeking long-term generation resources under Paragraph 75(b) of the  
6 Settlement Agreement, and should also become the "applicable...competitive resource  
7 acquisition rules or orders resulting from the workshop-rulemaking proceeding described  
8 in paragraph 79" and called for in Paragraph 75(d) of the Settlement.

6 In addition to utilizing the Recommended Best Practices For Procurement in the way I  
7 have described, Paragraph 75(b) should be modified by striking the phrase "from the  
8 competitive wholesale market" so that the Paragraph would then read as follows:

8 "The Company's efforts to secure adequate and reasonably-priced long-term  
9 resources to meet these needs."

10 Such a change would make it clear that the procedures outlined in the Recommended Best  
11 Practices For Procurement, including reliance on a RIP process and an independent  
12 monitor, would be the primary means through which APS should seek to satisfy its long-  
13 term resource needs. It would also resolve the ambiguity surrounding the nature and  
14 scope of the competitive wholesale market that became an issue in Docket No. E-  
15 01345A-06-0464.

16 Moreover, following the Recommended Best Practices For Procurement would help to  
17 ensure that APS does rely principally on the competitive markets to meet its long-term  
18 resource needs, as contemplated by the language quoted above.

17 **Q.8 Why should the Recommended Best Practices For Procurement be mandatory for  
18 APS for the duration of the self-build moratorium, as contrasted with discretionary  
19 for other Arizona electric utilities subject to regulation by the Commission, such as  
20 Tucson Electric Power Company and the electric cooperatives?**

20 **A.8** There are at least two (2) reasons and they are related. First, APS agreed to the self-build  
21 moratorium in consideration of other parties in APS' 2003 rate case withdrawing their  
22 opposition to APS' request for authority to acquire the 1,700 megawatts of PWEC  
23 generating assets and include them in APS' rate base. In fact, in Decision No. 67744, the  
24 Commission expressly recognized that linkage when it stated

23 "We generally agree that the self-build moratorium  
24 proposed in the Agreement is useful for addressing  
25 the potentially anticompetitive effects that may be  
26 associated with rate-basing the PWEC assets."  
27 [Decision No. 67744, page 25, lines 13-15]

27 and further, where it stated

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1 "The self-build moratorium agreed to by APS is  
2 consistent with the Commission's support for  
3 competitive wholesale electricity markets.  
[Decision No. 67744, page 26, lines 8-9]

4 Second, as the Commission itself noted in Decision No. 70032, the Recommended Best  
5 Practices For Procurement represent the resulting work product of those workshops  
6 provided for in Paragraph 79 of the Settlement Agreement. In that regard, Paragraph 79  
7 expressly required that "the workshops will be open to all stakeholders and the public"  
8 [Settlement Agreement, page 18]; and, APS was an active participant in the workshops  
9 which resulted in the Recommended Best Practices For Procurement. Thus, APS cannot  
10 suggest that it has not had an opportunity for either presentation or consideration of its  
11 views upon competitive procurement matters.

12 **Q.9 You have not discussed as yet whether Mesquite/SWPG/Bowie believe that**  
13 **Paragraph 80 of the Settlement Agreement needs to be modified in order to**  
14 **incorporate the Recommended Best Practices For Procurement. What is their**  
15 **position in that regard?**

16 **A.9 Paragraph 80 provides that**

17 "APS will continue to use its Secondary  
18 Procurement Protocol except as modified by the  
19 express terms of this Agreement or unless the  
20 Commission authorizes otherwise." [Settlement  
21 Agreement, page 18, emphasis supplied]

22 To the extent that the procurement requirements imposed upon APS by the Settlement  
23 Agreement and/or APS' Secondary Procurement Protocol are in any degree less  
24 restrictive, inconsistent with, or less clear and specific than the Recommended Best  
25 Practices For Procurement, it is the position of Mesquite/SWPG/Bowie that the latter  
26 constitute an "overlay" on the former.

27 Stated differently, and within the context of Paragraph 80, it is both reasonable and  
28 appropriate to interpret the phrase "unless the Commission authorizes" as meaning  
"unless the Commission directs otherwise." This interpretation is consistent with the  
language of Decision No. 67744 where it states that

APS will continue to use its Secondary Procurement  
Protocol except as modified by the Settlement  
Agreement or by Commission decision. [Decision  
No. 67744, page 26, lines 1-3, emphasis supplied]

In the view of Mesquite/SWP/Bowie, Commission Decision No. 70032 affected such a  
change to APS' procurement procedures. Thus, to the extent that any inconsistency might  
exist between the provisions of APS' Secondary Procurement Protocol and the

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requirements of the Recommended Best Practices For Procurement, the latter would control.

Q.10 Are there any specific provisions or specific language within Decision No. 67744 that must be modified, in order to accomplish the modification to which you have testified?

A.10 Based upon my discussions with Mesquite/SWPG/Bowie's regulatory counsel in Arizona, I do not believe so.

A.R.S. § 40-252 provides that

"The Commission may at any time, upon notice to the corporation affected, and after opportunity to be heard or upon a complaint, rescind, alter or amend any decision made by it."

The statute on its face does not appear to prescribe the manner in which a prior decision is to be rescinded, altered or amended, as long as the requirements of notice and an opportunity to be heard are satisfied. Further, based upon my discussions with Mesquite/SWPG/Bowie's Arizona regulatory counsel, it is my understanding that Arizona case law does not prescribe any specific manner in which such rescission, alteration or amendment is to be accomplished. Rather, that is left to the discretion of the Commission in the circumstances then before it. In this instance, since the Commission made only one Finding of Fact [Finding of Fact No. 33] and no Conclusions of Law in Decision No. 67744 which specifically refer to the self-build moratorium, it would appear to have broad latitude in the decision to be issued in this proceeding as to how it desires to amend Decision No. 67744 in that regard.

Q.11 Do Mesquite/SWPG/Bowie believe that the Commission has jurisdiction and authority to modify one or more of the provisions of Article IX (Competitive Procurement of Power) of the Settlement Agreement, as you have discussed and recommended in your testimony?

A.11 Yes, based upon my discussions with Mesquite/SWPG/Bowie's Arizona regulatory counsel. In that regard, he has directed my attention to the July 13, 2007 Procedural Order which was issued in this proceeding. That Procedural Order expressly states that all parties to APS' 2003 rate case were being sent a copy of the Procedural Order, in order that they would have notice that the Commission was opening a new docket and instituting a new proceeding for the expressly stated purpose of considering whether to modify Decision No. 67744 as it relates to the self-build moratorium. Further, those parties to APS' 2003 rate case were advised of the need to request intervention, if they wished to participate in this proceeding.

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1 **Q.12 How does notice of the fact that the Commission is considering modifying Decision**  
2 **No. 67744 as it relates to the self-build moratorium authorize the Commission to**  
3 **consider modification of Article IX (Competitive Procurement of Power) of the**  
4 **Settlement Agreement itself?**

5 A.12 Based upon discussions with Mesquite/SWPG/Bowie's Arizona regulatory counsel, as  
6 well as my own familiarity with the Settlement Agreement, it is my understanding that the  
7 Settlement Agreement had no legal effect without approval of the same by the  
8 Commission. Moreover, Article XXI (Commission Evaluation of Proposed Settlement)  
9 of the Settlement Agreement contemplates the possibility that the Commission might  
10 modify various provisions in the Settlement Agreement incident to its review and  
11 approval of the same; and, in fact, certain changes were made by the Commission through  
12 the language of Decision No. 67744, including a very important one pertaining to the self-  
13 build moratorium.

14 Thus, against this background, it is the position of Mesquite/SWPG/Bowie that the  
15 Commission has the jurisdiction and authority to amend both Decision No. 67744 and the  
16 pertinent provisions of the Settlement Agreement in order to incorporate the  
17 Recommended Best Practices For Procurement as discussed in my testimony.

18 **Q.13 Does that complete your direct testimony on behalf of Mesquite/SWPG/Bowie?**

19 A.13 Yes.  
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22  
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26  
27  
28



## QUALIFICATIONS OF THEODORE E. ROBERTS

My name is Theodore E. Roberts, and I am employed as Senior Regulatory Counsel at Sempra Energy. Sempra Energy is a Fortune 500 energy services company based in San Diego, California, that develops energy infrastructure, operates utilities, and provides related products and services to more than 29 million consumers in the United States, Europe, Canada, Mexico, South America and Asia. Sempra Energy is the ultimate parent company of Mesquite Power, LLC.

My job responsibilities include providing legal counsel to Sempra Global, the parent of Sempra's electric generation, retail energy services, and other merchant businesses on regulatory compliance, participating in state and federal regulatory rulemaking and other proceedings, and managing outside counsel in regulatory proceedings, including matters before the Arizona Corporation Commission. I participated in both the Track A and Track B proceedings, and participated extensively in the negotiation of the APS 2003 Rate Case Settlement, the Commission proceedings adopting that Settlement, the Commissions' procurement workshops conducted pursuant to the Settlement, and in Docket No. E-01345A-06-0464, wherein the Commission had occasion to first interpret the provisions of the Settlement Agreement and Decision No. 67744 pertaining to the self-build moratorium.

Prior to assuming my current position, I served as Regulatory Counsel to the Sempra Energy utilities on a variety of matters including the licensing and permitting of transmission and substation facilities, FERC-jurisdictional transmission rates and various transmission-related proceedings, and on electric procurement matters before the California Public Utilities Commission.

I hold a Juris Doctor degree *cum laude* from California Western School of Law and a Master of Business Administration degree from National University. I also hold a Bachelor of Music degree *magna cum laude* from Ashland University in Ashland, Ohio. I am a member of the State Bar of California, the San Diego County Bar Association and the Conference of California Public Utility Counsel.

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